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No. 73-235

In the Supreme Court of the United States

OCTOBER TERM, 1973

MARCO DEFUNIS, ET AL., PETITIONERS

v.

CHARLES ODEGAARD, ET AL., RESPONDENTS

MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN RESPONSE TO THE DEPARTMENT OF JUSTICE

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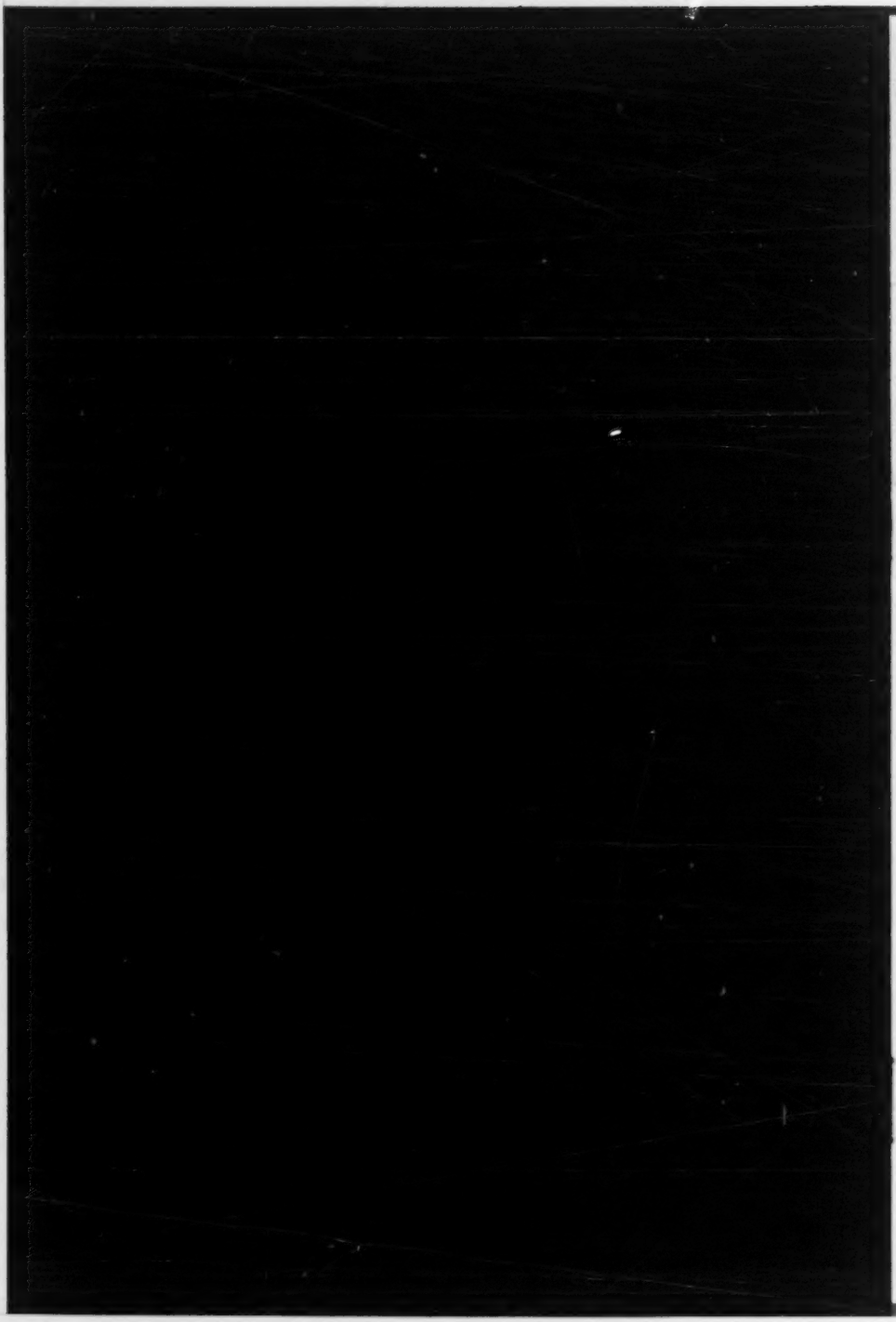

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-295

MARCO DEFUNIS, ET AL., PETITIONERS

v.

CHARLES ODEGAARD, ET AL., RESPONDENTS

MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN RESPONSE TO THE DEPARTMENT OF JUSTICE

This is in response to the letter from the Solicitor General suggesting that the motion of the Equal Employment Opportunity Commission for leave to file a brief *amicus curiae* and the brief attached thereto not be received by the Court since not authorized by the Solicitor General or the Attorney General. The suggestion, we submit, overlooks the fact that the Equal Employment Opportunity Commission is not claiming that it has a right to file a brief as of right, but is asking the permission of the Court to do so. It does not purport to represent the view of the United States or any other government agency, but merely to present to the Court its concern as to the possible effects of a decision in this case on the mat-

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ters which have been specifically entrusted by Congress to its expertise as an independent agency.

For these reasons, we do not believe that the statutes cited by the Solicitor General are applicable in this situation. We of course recognize that, where the Equal Employment Opportunity Commission is a party, Congress has provided that it shall be represented in the Supreme Court by the Attorney General. Section 705(b)(2) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. (Supp. II), 2000e–4(b). But the Commission is not a party to the instant litigation and is not seeking to present its views as such. Similarly, neither 28 U.S.C. 516 nor 28 U.S.C. 518 is applicable since the Commission is in no sense seeking to enter the proceeding as a litigant or as an agency which can as of right make its views known to the Court.

What we do suggest is that the Commission is an independent agency whose Commissioners and General Counsel are appointed for a fixed term to carry out specific duties entrusted by Congress. As such it is to a considerable degree independent of executive control, *Humphrey's Executor* v. *United States,* 295 U.S. 602, and has the ancillary powers which are appropriate to the exercise of its statutory duties even if not explicitly conferred by the statute. See *Federal Trade Commission* v. *dean Foods Co.,* 384 U.S. 597, 607. Its independent character, we submit, gives it the same right as any other independent organization to ask the Court to consider its views as to the potential

effect of a pending case on the matters specifically entrusted to its jurisdiction and to present to the Court its view of the applicable law. As an *amicus,* the Commission has no control over the litigation but, as set forth in the Statement of Interest, a decision in this case may affect its ability to carry on the duties entrusted to it by Congress. It seeks only to call these considerations to the Court's attention.

CONCLUSION

The motion is therefore appropriately before this Court for consideration.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I hereby certify that on February 11, 1974, three copies of the foregoing Memorandum Of The Equal Employment Opportunity Commission In Response To The Department of Justice were mailed, postage prepaid and special delivery, to the following counsel of record:

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